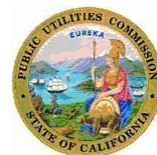


BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking for
Adoption of Amendments to a General
Order and Procedures to Implement the
Franchise Renewal Provisions of the
Digital Infrastructure and Video
Competition Act of 2006.

Rulemaking 13-05-007
(Filed May 23, 2013)

**PETITION OF THE OFFICE OF RATEPAYER ADVOCATES
FOR MODIFICATION OF COMMISSION DECISION 14-08-057**

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July 1, 2015

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I. INTRODUCTION

Pursuant to the California Public Utilities Commission (Commission) Rules of Practice and Procedure Rule 16.4, the Office of Ratepayer Advocates (ORA) submits this Petition for Modification of Commission Decision (D.) 14-08-057, which implements the franchise renewal process for the Digital Infrastructure and Video Competition Act (DIVCA).¹ ORA seeks changes to D.14-08-057 to ensure the Commission's upcoming first review of franchise renewal applications is open, transparent, and meaningfully available to the public, specifically: (1) require public participation hearings (PPH) to give the public and communities the opportunity to be heard; (2) allow the public to comment on issues outside a video franchise applicant's compliance with non-appealable court orders; and (3) remove current language stating that ORA's comments will not be considered as part of the renewal application.

¹ Rule 16.4 states: "A petition for modification asks the Commission to make changes to an issued decision." Such petitions must be brought within one year of the date of issuance of the decision.

Given the Commission’s franchise renewal process occurs only once every ten years, it is imperative that the process be modified to allow for critical stakeholder input on whether video service providers are meeting the State’s many goals such as increased competition that provide consumers with “more choice, lowers prices, speeds the deployment of new communication and broadband technologies, creates jobs, and benefits the California economy”.² With this crucial information, the Commission will be better positioned to renew franchise licenses that are only in the public’s best interest and continue to adhere to its renewed commitment to public accountability, openness and participation. ORA applauds this commitment.

II. CHANGES TO DECISION 14-08-057 ARE NECESSARY

There are four reasons why ORA urges the Commission to modify D.14-08-057. First, D.14-08-057, which was adopted prior to the Commission’s renewed commitment to public participation, openness and transparency, is inconsistent with those commitments. Instead, D.14-08-057 prohibits public participation or input into DIVCA franchise renewal decisions, outside of comments on an applicant’s violation of non-appealable court orders, and limits ORA’s role by refusing to consider any information provided by ORA during the licensing renewal process. Evidence of the video providers’ discrimination against low income neighborhoods, cross-subsidization, poor customer service, or lack of public educational and governmental access channels will not be considered when they apply to renew their licensing authority.

Second, Public Utilities (PU) Code 5810(a)(3) establishes that the “public interest” is best served when sufficient resources are devoted to “appropriately and timely process applications of video service providers and to ensure full compliance with the

² P.U. Code Section 5810(1)(B)

requirements of this division.”³ In efforts to meet the public interest described in the DIVCA statute, the Commission should allow the public and ORA to comment on issues relating to compliance with DIVCA rules during an applicant’s franchise renewal and not restrict comments to an applicant’s violation to non-appealable court orders.

Third, federal law requires significant public participation in franchise renewals through substantive comments.⁴ In addition, the California Legislature expressly gave ORA the authority to “advocate” on behalf of subscribers during the franchise renewal process.⁵ Decision 14-08-057 establishes a renewal process that is easy for video providers but disregards the rights of the public to comment and provide input. Therefore, D.14-08-057 should be modified to allow the public and ORA to meaningfully participate, and that any information that ORA brings to the Commission’s attention during the DIVCA renewal process be given its due consideration.

Fourth, public comment and participation are core elements and channels for obtaining information on video service provider’s non-compliance with DIVCA rules, especially given the lack of comprehensive data available through the Commission’s complaint process. On April 9 2015, the California State Auditor issued a report finding that the Commission is not accurately capturing the “true nature of complaints it receives”. Such inaccurate information is, in turn, provided to users of the information, such as the Commission staff. Without accurate and complete complaint data, public

³ P.U. Code Section 5810(a)(3): “The public interest is best served when sufficient funds are appropriated to the commission to provide adequate staff and resources to appropriately and timely process applications of video service providers and to ensure full compliance with the requirements of this division.”

⁴ See 47 U.S.C. Sections 546. While D.14-08-057 at 16 recognizes the public comment requirement, inexplicably the decision limits the public comment to whether there has been a “violation of a final nonappealable court order” by the carrier, an overly restrictive interpretation.

⁵ P.U. Code Section 5900(k).

comment is critical to bring complaints to the Commission's attention to consider and review during the renewal process for video franchises.

III. PROCEDURAL BACKGROUND

Decision 14-08-057 amends General Order 169 and adopts procedures for implementing the franchise renewal provisions of the Digital Infrastructure and Video Competition Act of 2006, Assembly Bill (AB) 2987 (DIVCA) (Ch. 700, Stats. 2006). Pursuant to P.U. Code Section 5850, DIVCA franchises are valid for 10 years, and then must be renewed under the provisions of Sections 5850 and 5840. In addition to licensing requirements, DIVCA contains provisions pertaining to customer service, anti-discrimination, access to public, educational, and governmental (PEG) channels, cross-subsidization, and fines for violations of DIVCA. Prior to Assembly Bill (AB) 2987 which became law in 2007, operating authority was vested in the local municipalities. Authority for reviewing and granting the video providers' application for authority is now with the Commission.

DIVCA franchises will begin expiring in 2017. The Commission will begin receiving renewal applications sometime in late 2016, depending on the exact date of the franchise grant. Section 5840 contains the requirements for the Commission to issue new DIVCA franchises, which must be followed during the renewal process. In D.07-03-014, the Commission implemented procedures for new DIVCA franchises.

The laws relating to the renewal process are not exactly the same as the new application process. The Legislature explicitly stated that ORA is to have a role reviewing DIVCA franchise renewal applications as well as in the enforcement of Sections 5900, 5890 and 5950. Section 5900(k) states: "The Office of Ratepayer Advocates shall have authority to advocate on behalf of video subscribers regarding renewal of a state-issued franchise..." In D.07-03-014, the Commission agreed, holding that "Public Utilities Code § 5900(k) expressly gives [O]RA a right to advocate 'regarding renewal of a state-issued franchise and enforcement of Sections 5890, 5900, and 5950,' but no part of DIVCA gives [O]RA the express right to advocate regarding a

state video franchise application.”⁶ [Emphasis added.] In other words, ORA could not advocate for consumers during the new application process, but ORA could advocate during the renewal process. Inexplicably and erroneously, D.14-08-057 continued the prohibition on ORA’s and the public’s ability to meaningfully comment in renewal applications, despite the express language of Section 5900(k).⁷

In D.14-08-057, the Commission looked to Section 5850, which provides that video providers will submit renewal applications that must follow the criteria and process of Section 5840. Section 5850 also states that franchise renewals must be consistent with federal law and shall not be granted “if the video service provider is in violation of any final non-appealable court order issued pursuant to this division.”

Decision 14-08-057 implements procedural requirements for DIVCA applicants in the renewal process. However, the decision essentially prohibits meaningful public participation by holding that public comments must be limited solely to whether the video provider is in violation of a “non-appealable court order” issued under DIVCA. If interpreted as the “only” proper subject for comments, it would essentially mean no comments, because ORA is unaware of this ever occurring. Under the decision, the public is not allowed to comment on whether the video provider has terrible customer service. Municipalities cannot comment on whether the video provider discriminates against members of its community. Local entities cannot comment that a video provider has failed to provide access channels for education and government services. The public may not bring evidence of cross-subsidization to the Commission’s attention.

⁶ D.07-03-014, p. 96.

⁷ D.14-08-057 states: “ORA’s arguments were disposed of in D.07-11-014, again on rehearing in D.07-11-049, and summarily rejected by the Court of Appeals. For renewal applications, ORA contends that § 5850(b) allows the Commission to use a different process, including allowing ORA to file protests. We find that ORA’s argument contradicts the plain language in § 5850(b) which requires the same process for both initial and renewal applications.” The decision ignores the fact that Section 5900(k) mandates ORA to advocate on behalf of subscribers during the renewal process.

Moreover, while ORA is provided the opportunity to comment, the decision states that any information from ORA “will have no bearing on the process for renewal of franchises.”⁸ In other words, the Commission will approve renewal applications even if ORA presents evidence of illegal cross-subsidization, discrimination, poor customer service, or violations of DIVCA.

IV. D.14-08-057 SHOULD BE MODIFIED TO ALLOW PUBLIC PARTICIPATION AND FOR ORA’S COMMENTS TO BE CONSIDERED

As discussed above, in addition to being at odds with the plain language of the statute, D.14-08-057 is inconsistent with the Commission’s commitment to public accountability, openness and fairness. In addition, D.14-08-057 is in violation of federal and state laws, as described below. Therefore, D.14-08-057 should be modified to allow the public and ORA the ability to bring violations of DIVCA to the Commission’s attention during the franchise renewal process.

Specifically, D.14-08-057 should be modified to allow meaningful public input. This should include submission of substantive comments on video providers’ renewal applications and public participation hearings to give the public the opportunity to be heard. This would permit the public to raise the Commission’s awareness regarding possible violations of DIVCA, including such matters as discrimination against low-income communities, cross-subsidization, poor customer service, and lack of public educational and governmental (PEG) access channels. For example, the City of Los Angeles is currently prohibited from notifying the Commission during a DIVCA application renewal process of a recent lawsuit by the City against Time Warner Cable for approximately \$10 million. The City of Los Angeles alleges that TWC has profited billions in Los Angeles while refusing to pay about \$10 million in franchise fees, relating

⁸ D.14-08-057, Conclusion of Law #6.

to a dispute over the provision of public, education, and government (PEG) channels. That information should be part of the Commission's process.

Public participation has also been curtailed by disallowing intervenor compensation in video franchising proceedings. D.07-03-014 ordered that "no party shall be awarded intervenor compensation in a proceeding arising under DIVCA."² The banning of intervenor compensation makes participation from consumer organizations unlikely to occur and as such, the Commission must consider other ways to encourage public input. The Commission can encourage public participation through public comment and public participation hearings on video providers' renewal applications, and by not limiting ORA's statutory mandate to advocate on behalf of video subscribers. D.14-08-057 should be modified to remove language that essentially prohibits ORA from filing substantive comments. Conclusion of Law # 6 limits ORA's ability to comment on any of the substantive areas listed above, and prohibits ORA from commenting on anything other than the completeness of the renewal application. Even then, the decision states that ORA's comments "will have no bearing on the process for renewal of franchises." Conclusion of Law # 6 should be deleted in its entirety, and the portion of Appendix A to D.14-08-057 that repeats Conclusion of Law #6 should be re-worded accordingly.

V. THE COMMISSION'S RENEWED COMMITMENT TO PUBLIC ACCOUNTABILITY, OPENNESS, AND PARTICIPATION REQUIRES CHANGES TO D.14-08-057

As referenced above, the Commission has pledged a new direction towards openness, accountability, and participation. The Commission's decision to exclude public participation in the franchise renewal process severely limits its ability to fairly and thoughtfully evaluate video providers' franchise renewal applications. The law

² D.07-03-014 at p. 284

provides for enforcement to prevent discrimination (Section 5890) and cross-subsidization (Section 5940 and 5950), and to ensure consumer protection (Section 5900). (See Conclusion of Law # 11, D.07-03-014.). The public should be given a meaningful opportunity to alert the Commission to violations and raise concerns related to, for example, service quality and reliability, marketing and sales practices, and performance in meeting commitments made with local communities.

ORA supports the Commission's renewed commitment to enhance public participation and ensure openness and transparency. The statement in D.14-08-057 that any comments by ORA "will have no bearing" on renewal franchises is in direct contradiction to this commitment.

VI. FEDERAL LAW REQUIRES FULL AND OPEN PUBLIC COMMENT ON DIVCA RENEWAL APPLICATIONS

Section 5850(c) expressly requires the Commission to be consistent with federal law. Federal law (47 USC Section 546(h)) allows for expedited renewal applications, providing that "a franchising authority may, **after affording the public adequate notice and opportunity for comment**, grant or deny such proposal at any time." [Emphasis added.] In other words, under Section 546(h) parties may comment on any aspect of a renewal application. There is no limitation in Section 546(h) on the scope of parties' comments. Decision 14-08-057 correctly finds that protests are permitted because federal law 47 USC Section 546(h) permits them, but commits legal error by limiting such protests to violations of final non-appealable court orders.¹⁰ It is not consistent with federal law to limit protests in this way.

Moreover, 47 USC Section 546(d) permits a franchising authority to deny a renewal proposal if the following criteria stated in 47 USC Section 546(c) are not met: (A) the cable operator has substantially complied with the material terms of the existing

¹⁰ D.14-08-057, p. 6.

franchise and with applicable law; (B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs; (C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and (D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests. These provisions indicate that federal law permits a substantive review.

Public comment at the federal level is allowed on any of the items listed above, because all of those are reasons for denial of the application. The decision thus violates federal law by limiting protests solely to whether there is a violation of a final non-appealable court order, in that federal law contains no limitation on broader public comments.

The decision states that the reason for imposing this limitation is a belief that Section 5850 limits this Commission's renewal inquiry to whether a video service provider is in violation of a final non-appealable court order issued pursuant to DIVCA. However, DIVCA contains no such limitation, as discussed below.

VII. STATE LAW REQUIRES ORA TO ADVOCATE ON BEHALF OF VIDEO SUBSCRIBERS DURING THE RENEWAL PROCESS

Decision 14-08-057 strikes the wrong balance between allowing for expedited review of renewal applications and allowing ORA to advocate for subscribers, by giving all of the weight to expediency and almost none to advocacy. Thus, the decision commits further legal error by interpreting Section 5850 in such a way as to render Section 5900(k) meaningless, because it does not allow ORA to meaningfully advocate on behalf of video subscribers regarding renewal of state-issued franchises.

A basic rule of statutory construction is that statutes (and provisions within statutes) should not be read in a way that renders them meaningless. However, by

narrowly focusing on Section 5850, the decision errs by giving no weight to the provisions about advocacy in Section 5900(k). Inexplicably, while the decision states that ORA may file comments, “the Commission will not consider [them] as part of the franchise renewal process but may lead to further action outside the renewal process.”¹¹

The decision justifies this by stating that it intends “to give greater effect to §5900(k)” by giving ORA the right to file comments. However, this statement cannot be reconciled with the statement that the Commission “will not consider” such comments. By refusing to consider ORA’s comments, the Commission has deprived ORA the opportunity to advocate on behalf of subscribers during the renewal process, in direct contravention of the Legislature’s mandate that ORA “shall have authority to advocate on behalf of video subscribers regarding renewal of a state-issued franchise...” Whether such input from ORA “may lead to further action outside the renewal process” does not resolve the inconsistency with Section 5900(k).

VIII. PUBLIC COMMENT AND PARTICIPATION PROVIDE THE COMMISSION WITH INFORMATION ON CONSUMER CONCERNS THAT OTHERWISE MAY NOT BE PROPERLY CAPTURED BY OTHER COMMISSION CHANNELS SUCH AS CAB COMPLAINTS

During the August 28, 2015 Commission voting meeting adopting D.14-08-057, some of the Commissioners expressed interest in hearing consumers’ and stakeholders’ concerns about service providers. ORA commend the Commission for its desire to listen and become aware of issues and concerns as part of the franchise renewal process. However, the appropriate venue or channel for public and stakeholder input is unclear. For example, the Commission may request complaint information on video service providers seeking a franchise renewal license through the Commission’s Consumer Affairs Brach (CAB). Video service providers deliver a number of services to consumers

¹¹ D.14-08-057, p. 21.

outside of video including Voice over Internet Protocol (VoIP) and/or broadband. Consumers who have concerns with their video service provider on issues related to VoIP can contact CABS to report complaints.

However, the California State Auditor recently conducted an audit of the Commission's CABS system that found the quality of complaint data to be questionable resulting in unreliable information.¹² Given the lack of reliable data accessible to the Commission, it becomes more critical for the public, stakeholders, and ORA to have the opportunity to voice concerns and issues on video service providers' non-compliance with DIVCA rules through public comment and public participation hearings where a transcript becomes part of the record for the Commission and the public to see. The findings in the State Auditor Reports illustrate why public comment and public participation hearings in affected communities is essential to the video franchise renewal process. Protecting consumers is a major goal of the Commission and allowing the public to bring awareness of issues relating to an applicant's non-compliance with DIVCA rules through substantive comments serves the public interest and provides the Commission with information to make informed decisions.

IX. NOTHING IN DIVCA PROHIBITS PUBLIC COMMENT ON DIVCA RENEWAL APPLICATIONS

Nothing in Section 5850, or any other part of DIVCA (Section 5800 et seq.), prohibits ORA or the public from filing substantive comments. Yet D.14-08-057 appears to believe that Section 5850 mandates that only comments pertaining to "violations of a non-appealable court order" under DIVCA are allowed. However, this is based on a mischaracterization of Section 5850, which provides that such violations will require a denial of the renewal application, but not that such violations are the only permissible reason for a denial. Public comments are simply not mentioned in DIVCA, presumably

¹² California State Auditor Report – April 2015 <https://www.bsa.ca.gov/pdfs/reports/2014-120.pdf>

because they are expressly permitted by federal law, and Section 5850 mandates that the Commission act consistently with federal law.

Instead, the decision appears to overemphasize the importance¹³ of Section 5850(b) without giving sufficient weight to Section 5900(k). Section 5850(b) prohibits the Commission from imposing new “criteria” on the renewal process. However, allowing ORA to comment on the sufficiency of the renewal application pursuant to Section 5850 does not add new criteria to the application process. Protests are merely a procedural vehicle in which parties can raise concerns about the applicant’s compliance with existing criteria in the application. In fact, neither Section 5850, nor any other part of DIVCA, ban protests. Comments or protests are simply not mentioned in DIVCA.

Thus, the Commission may impose new procedures that do not impose new criteria. The decision fails to identify the fundamental differences between “criteria” and “process”. In fact, D.14-08-057 already imposes a new process by allowing comments when they were not allowed by D.07-03-14. However, D.14-08-057 errs by refusing to consider the comments during the renewal process.

Comments and/or protests are a procedural vehicle in which interested parties point out deficiencies in an application. In and of themselves, protests do not impose any criteria on the application. “Criteria” in its normal meaning refers to “standards, measures, specifications, yardsticks, etc.” (The term is not defined in DIVCA.) Thus, while the Commission may not impose additional standards or specifications on DIVCA renewal applications, protests do not do that – they are one source to learn whether existing standards or specifications have been met by the applicant or not.

Simply put, there is no conflict between Section 5850 and Section 5900(k). Allowing ORA to comment on the sufficiency of the renewal application pursuant to Section 5850 does not add new criteria to the application process, because protests in and

¹³ D.14-08-057, Footnote 22.

of themselves do not introduce new criteria. Moreover, the ban on protests is not derived from anything explicit in DIVCA. The Commission can (and must) be consistent with Section 5900(k) by permitting ORA to comment, without violating any other provision of DIVCA.

X. CONCLUSION

The franchise renewal process occurs only once every ten years. The Commission will be conducting its first review of renewal applications and must modify the process to allow for critical stakeholder input, be consistent with state goals, and continue to adhere to its renewed commitment to public accountability, openness and participation. This is necessary to develop a robust record for the Commission to use to ensure franchise licenses are only renewed if it's in the public's best interest.

This is supported by Section 5900(k) which permits comments by ORA as part of the process for considering renewal applications. Federal law is also consistent and explicit in allowing public notice and opportunity for comment on renewal applications. While DIVCA is clear on the criteria for considering new or renewal franchise applications, there is nothing in DIVCA that limits the types of information that should be available to the Commission to determine whether those criteria are met. Consideration by all means available of relevant information on whether these criteria are met, including comments from ORA and others and public participation hearings convenient to a franchisees customers are appropriate and essential. This is also consistent with the Commission's expressed determination to move toward "openness and transparency" in its decision-making. ORA urges that Decision 14-08-057 be modified as requested and requests that such modifications occur prior to the upcoming renewal application submissions expected to be filed in 2016.¹⁴

¹⁴ The earliest a state video franchise may be renewed is 2017 with applications expected to come in 2016. D.14-08-057 Attachment A, p.A-11: "An Application for the renewal of a state video franchise shall be submitted to the Commission's Video Franchise Group no later than 3 months prior to the date

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Respectfully submitted,

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July 1, 2015

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the current franchise is due to expire or 3 months prior to the end of the 10th year from the date of its issuance and no earlier than 6 months prior to the date the current franchise is due to expire or 6 months prior to the end of the 10th year from the date of its issuance.”